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MALAYAN BANKING BHD v. PUNJAB NATIONAL BANK

FEDERAL COURT, PUTRAJAYA
NALLINI PATHMANATHAN FCJ
ZALEHA YUSOF FCJ
HARMINDAR SINGH DHALIWAL FCJ
B [CIVIL APPEAL NO: 02(f)-75-11-2020(W)]
23 MAY 2022

Abstract – *In dealing with letter of credit (LC) transactions between the trading parties and the issuing and negotiating banks, including transactions under the Uniform Customs and Practice for Documentary Credits as issued by the International Chambers of Commerce vide its ICC Publication No. 600, one must bear in mind that the duty of a bank to negotiate under the LC is not subject to claims or defences taken under the underlying contract, that banks deal with documents and not with goods, services or performance to which the documents relate, that the issuing bank (herein Punjab National Bank), is irrevocably bound to honour the LC as of the time it issues the same, and that the issuing bank's undertaking to reimburse the nominated or negotiating bank is independent of the former's undertaking to the beneficiary. On the facts, the Court of Appeal erred in relieving Punjab National Bank of its duty to reimburse Malayan Banking Berhad for the USD1,983,763.65 the latter paid the seller under the LC; the documents as presented to and examined by MBB appeared on their face to constitute a complying presentation, more so when the bills of lading presented paralleled to Ocean Bills of Lading, and not to Freight Forwarder Bills as complained. Since the documents presented to MBB were not discrepant, and since the Notice of Refusal to reimburse by Punjab National Bank, which is a strict requirement of international LC transactions, is also faulty, Punjab National Bank cannot avoid its obligation to reimburse.*

BANKING: *Banks and banking business – Letter of credit – Issuance of – Refusal to honour obligations for reimbursement by issuing bank – Whether complied with requirement under UCP-600 – Whether notice of refusal issued to negotiating bank – Whether documents presented under letter of credit constituted complying presentation – Whether negotiating bank only required to examine documents on face and not beyond – Whether issuing bank entitled to raise issue on manner of negotiation of documents – Whether issuing bank obligated to reimburse negotiating bank*

The respondent ('Punjab Bank'), at the request of Sara International Limited ('buyer'), issued a letter of credit ('LC') in favour of SIMS Copper Sdn Bhd ('seller') to finance the purchase of goods by the buyer from the seller. The LC was conveyed by Punjab Bank through a SWIFT message to the Royal

Bank of Scotland ('RBS'), which was forwarded by RBS to the appellant ('Maybank'). The terms of the LC were duly communicated by Maybank to the seller. The LC expressly incorporated the UCP-600 and it was common ground that the rules in the UCP-600, unless expressly excluded or modified, were binding on all parties to the LC. Subsequently the seller presented the documents specified in the LC to Maybank in ten separate presentations and requested Maybank to negotiate, *ie*, purchase, them. Maybank, relying on the reimbursement undertaking, negotiated the documents and paid a total sum of USD1,983,765.65 to the seller under the LC. Maybank forwarded the original documents presented by the seller under the LC ('documents') to Punjab Bank and sought reimbursement of the sums paid to the seller. However, Maybank received a notice of refusal from Punjab Bank alleging, amongst others, the bills of lading presented under the LC were discrepant. Maybank disputed it and demanded payment and reimbursement of the sum paid to the seller. Punjab Bank claimed they have notified Wells Fargo of the alleged discrepancies. Maybank subsequently requested Punjab Bank to seek waiver of the alleged discrepancies from the buyer and thereafter effect payment to them but was informed by Punjab Bank that the buyer was not willing to waive the alleged discrepancies and that they would return the documents. Maybank received the documents on 6 January 2012 and continued to follow up with Punjab Bank on the reimbursement under the LC. As payment and reimbursement were not forthcoming, Maybank commenced an action against Punjab Bank. The High Court entered judgment against Punjab Bank. However, on appeal to the Court of Appeal, the decision was set aside. Hence, Maybank obtained the leave of court to file an appeal on the following questions of law: (i) where an issuing bank of a LC governed by the UCP-600 determines documents presented do not constitute a complying presentation, whether the issuing bank: (a) must give notice to the negotiating bank in accordance with art. 16(c) and (d) of the UCP-600, irrespective of the nature of the non-compliance; and (b) is precluded from claiming the documents presented do not constitute a complying presentation, and obliged to honour their reimbursement undertaking, if notice is not given in accordance with art. 16(c) and (d) of the UCP-600; (ii) in determining whether documents presented under a LC governed by the UCP-600 constitute a complying presentation, whether a negotiating bank is only required to examine whether or not the documents appear on their face to constitute a complying presentation within the meaning of the UCP-600; and (iii) where a LC governed by the UCP-600 expressly provides it is available for negotiation by any bank in Malaysia, whether an issuing bank can avoid their obligation to reimburse the negotiating bank on grounds not stated in the notice of refusal, and which relate to the manner of negotiation of the documents presented under the LC.

A B C D E F G H I

Held (allowing appeal with costs; setting aside order of Court of Appeal and restoring order of High Court)
Per Harmindar Singh Dhaliwal FCJ delivering the judgment of the court:

(1) Article 16 of the UCP-600 imposes a strict obligation on an issuing bank to give notice of refusal to the negotiating bank, if they refuse to honour their reimbursement undertaking on the ground the documents do not constitute a complying presentation, a common feature of international letter of credit transactions. Punjab Bank's refusal to honour their reimbursement undertaking was premised solely on the claim that the documents contained discrepancies. However, the ground relied upon by Punjab Bank that the bills of lading presented by the seller did not comply with the LC as they were issued and signed by a freight forwarder, Diffreight Agencies, was wholly untenable. Although the bills of lading were signed by Diffreight Agencies, as an agent on behalf of the carrier Diffreight, there was nothing on the face of the bills of lading which indicated that Diffreight Agencies was a freight forwarder. In the absence of any evidence, the claim remained a bare assertion and, in the circumstances, was wholly misconceived. Even if it was established that Diffreight Agencies was a freight forwarder, the fact that they signed 'as agent on behalf of the carrier Diffreight' meant that the bill of lading was indeed an ocean bill of lading. It could not therefore be a freight forwarder's bill of lading. (paras 26-30)

(2) The bank examining a presentation is only required to examine whether the documents appear on the face to constitute a complying presentation. Banks are not required to go beyond the face of the document. To impose a duty to investigate beyond the documents, is both unrealistic and burdensome to banks. In this case, to insist that Maybank should be concerned whether the goods under the LC had been shipped or delivered to the buyer was contrary to the well-established rule that in letter of credit transactions, banks deal with documents and not with goods. Maybank was thus justified in saying the bills of lading presented by the seller appeared on their face to constitute a complying presentation. Accordingly, questions (i) and (ii) were answered in the affirmative. (paras 31-33)

(3) Punjab Bank's sole reason for rejecting the documents was due to alleged discrepancies in the documents. Punjab Bank did not raise any issue on the manner of negotiation of the documents in their notice of refusal to Maybank. Punjab Bank was not entitled to raise these issues to avoid their obligation to reimburse Maybank as it was Maybank, as the negotiating bank that was fully entitled to determine the manner of negotiation of the documents. They were entitled to pay the seller in advance, in anticipation of receipt of a complete set of the original documents. (paras 36-38)

(4) The payment by Maybank to the seller before the maturity date of the LC was entirely consistent with negotiation of the documents presented by the seller under the LC. The Court of Appeal was plainly wrong to hold that the payment had to do with a separate loan transaction between Maybank and the seller. The evidence clearly showed Maybank paid the sum of USD1,983,765.65 to the seller pursuant to negotiation of the documents under the LC. Maybank's cause of action against Punjab Bank was for reimbursement of the sum paid under the LC and therefore, there was no need for Maybank to call the seller as a witness. In the circumstances, the Court of Appeal was plainly wrong to invoke an adverse inference against Maybank for failing to call the seller as a witness. (para 40)

Bahasa Melayu *Headnotes*

Responden ('Punjab Bank'), atas permintaan Sara International Limited ('pembeli'), mengeluarkan surat kredit (LC') berpihak pada SIMS Copper Sdn Bhd ('penjual') untuk membiayai pembelian barangan oleh pembeli daripada penjual. Surat kredit tersebut disampaikan oleh Punjab Bank melalui pesanan SWIFT kepada Royal Bank of Scotland ('RBS'), yang kemudian disampaikan RBS kepada perayu ('Maybank'). Terma-terma LC dinyatakan sewajarnya oleh Maybank kepada penjual. Surat kredit secara nyata memasukkan UCP-600 dan adalah prinsip umum bahawa kaedah-kaedah dalam UCP-600, kecuali secara nyata dikecualikan atau diubah, mengikat kesemua pihak dalam LC. Kemudian, penjual mengemukakan dokumen-dokumen yang dinyatakan dalam LC kepada Maybank dalam sepuluh perbentangan berasingan dan memohon Maybank untuk menawar, iaitu, membelinya. Maybank, bersandar pada aku janji pembayaran balik, menawar dokumen-dokumen tersebut dan membayar sejumlah USD1,983,765.65 kepada pembeli bawah LC. Maybank menghantar dokumen-dokumen asal yang dibentang oleh penjual bawah LC ('dokumen-dokumen') kepada Punjab Bank dan memohon pembayaran balik jumlah yang dibayar kepada penjual. Walau bagaimanapun, Maybank menerima notis penafian daripada Punjab Bank mendakwa, antara lain, bil muatan yang dikemukakan bawah LC adalah bercanggah. Maybank mempertikaikannya dan menuntut bayaran dan pembayaran balik jumlah yang dibayar kepada penjual. Punjab Bank mendakwa mereka telah memaklumkan Wells Fargo tentang percanggahan yang didakwa. Kemudian, Maybank meminta Punjab Bank memohon pengecualian percanggahan yang didakwa daripada pembeli dan, selepas itu, membuat bayaran kepada mereka tetapi diberitahu oleh Punjab Bank bahawa pembeli tidak mahu mengecualikan percanggahan yang didakwa dan mereka akan mengembalikan dokumen-dokumen tersebut. Maybank menerima dokumen-dokumen tersebut pada 6 Januari 2012 dan menyusul dengan Punjab Bank berkaitan pembayaran balik bawah LC. Oleh sebab bayaran dan pembayaran balik tidak dibuat, Maybank memulakan

tindakan terhadap Punjab Bank. Mahkamah Tinggi memasukkan penghakiman menentang Punjab Bank. Walau bagaimanapun, atas rayuan ke Mahkamah Rayuan, keputusan tersebut diketepikan. Oleh itu, Maybank memperoleh kebenaran mahkamah untuk memfailkan rayuan atas soalan-soalan undang-undang berikut: (i) apabila bank yang mengeluarkan LC yang tertakluk pada UCP-600 memutuskan dokumen-dokumen yang dikemukakan tidak membentuk pematuhan pengemukaan, sama ada bank yang mengeluarkannya: (a) perlu memberi notis kepada bank yang menawarkan menurut perkara 16(c) dan (d) UCP-600, tanpa mengira sifat ketidakpatuhan tersebut; dan (b) dihalang daripada menuntut dokumen-dokumen yang dikemukakan tidak membentuk pematuhan pengemukaan, dan bertanggungan untuk memenuhi aku janji pembayaran balik, jika notis tidak diberi menurut perkara 16(c) dan (D) UPC-600; (ii) apabila memutuskan sama ada dokumen-dokumen yang dikemukakan bawah LC yang tertakluk pada UCP-600 membentuk pengemukaan pematuhan, sama ada bank yang menawar hanya diperlukan memeriksa sama ada atau tidak dokumen-dokumen tersebut secara zahirnya membentuk pengemukaan pematuhan menurut maksud UCP-600; dan (iii) apabila surat kredit yang tertakluk pada UCP-600 jelas memperuntukkan itu tersedia untuk rundingan oleh mana-mana bank di Malaysia, sama ada bank yang mengeluarkannya boleh mengelak tanggungjawab membuat pembayaran balik kepada bank yang menawarkannya atas alasan-alasan yang tidak dinyatakan dalam notis penafian, dan yang berkait dengan cara tawaran dokumen-dokumen yang dikemukan bawah LC.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan perintah Mahkamah Rayuan dan mengembalikan perintah Mahkamah Tinggi)
Oleh Harmindar Singh Dhaliwal HMP menyampaikan penghakiman mahkamah:

(1) Perkara 16 UCP-600 mengenakan tanggungjawab ketat pada bank yang mengeluarkan untuk memberi notis penafian kepada bank yang membuat tawaran, jika mereka enggan memenuhi aku janji pembayaran balik atas alasan dokumen-dokumen itu tidak membentuk pengemukaan pematuhan, salah satu ciri umum dalam transaksi surat kredit antarabangsa. Keengganan Punjab Bank memenuhi aku janji pembayaran balik adalah berdasarkan semata-mata atas dakwaan bahawa dokumen-dokumen tersebut mengandungi percanggahan. Walau bagaimanapun, alasan yang disandari oleh Punjab Bank bahawa bil-bil muatan yang dikemukakan oleh penjual tidak mematuhi LC kerana itu dikeluarkan dan ditandatangani pengangkut barangan, Diffreight Agencies, tidak boleh dipertahankan sama sekali. Walaupun bil muatan ditandatangani oleh Diffreight Agencies sebagai ejen bagi pihak pengangkut, Diffreight, tiada apa-apa secara zahir pada bil-bil muatan tersebut yang menunjukkan bahawa Diffreight Agencies adalah pengangkut barang.

Tanpa apa-apa keterangan, dakwaan tersebut kekal pernyataan semata-mata dan dalam keadaan itu, adalah salah anggap. Walaupun dibuktikan bahawa Diffreight Agencies adalah pengangkut barang, fakta bahawa mereka menandatangani 'sebagai ejen bagi pihak pengangkut Diffreight' bermaksud bil muatan itu sememangnya bil muatan lautan. Dengan itu, tidak boleh menjadi bil muatan pengangkut barang.

(2) Bank yang memeriksa pengemukaan hanya diperlukan memeriksa sama ada dokumen-dokumen jelas secara zahirnya membentuk pengemukaan pematuhan. Bank-bank tidak perlu memeriksa melampaui dokumen. Mengenakan tanggungjawab menyiasat melampaui dokumen, tidak realistik dan membebankan bank-bank. Dalam kes ini, untuk mendesak Maybank sepatutnya memberi perhatian sama ada barangan bawah LC telah dihantar atau disampaikan kepada pembeli adalah bertentangan dengan kaedah matan bahawa dalam transaksi surat kredit, bank-bank berurusan dengan dokumen dan bukan barangan. Maybank oleh itu mempunyai justifikasi apabila menyatakan bil-bil muatan yang dikemukakan penjual jelas secara zahir membentuk pengemukaan pematuhan. Dengan itu, soalan-soalan (i) dan (ii) dijawab secara afirmatif.

(3) Satu-satunya alasan Punjab Bank menolak dokumen-dokumen adalah kerana percanggahan yang didakwa dalam dokumen-dokumen tersebut. Punjab Bank tidak membangkitkan apa-apa isu tentang cara perundingan dokumen-dokumen dalam notis penafian mereka kepada Maybank. Punjab Bank tidak berhak membangkitkan isu-isu ini untuk mengelak kewajipan mereka untuk tanggungjawab membuat pembayaran balik kepada Maybank kerana hanya Maybank, sebagai bank merunding yang berhak sepenuhnya untuk menentukan cara perundingan dokumen-dokumen tersebut. Mereka berhak membuat bayaran awal kepada penjual, dengan jangkaan menerima set penuh dokumen-dokumen asal.

(4) Bayaran oleh Maybank kepada penjual sebelum tarikh matang LC konsisten sepenuhnya dengan rundingan dokumen-dokumen yang dikemukakan penjual bawah LC. Mahkamah Rayuan jelas khilaf apabila memutuskan bahawa bayaran tersebut berkait dengan transaksi pinjaman berasingan antara Maybank dan penjual. Keterangan jelas menunjukkan Maybank membayar jumlah USD1,983,765.65 kepada penjual menurut rundang dokumen-dokumen bawah LC. Kausa tindakan Maybank terhadap Punjab Bank adalah untuk pembayaran balik jumlah yang dibayar bawah LC tersebut dan oleh itu, tidak perlu untuk Maybank memanggil penjual sebagai saksi. Dalam keadaan itu, Mahkamah Rayuan jelas khilaf apabila membangkitkan inferens bertentangan terhadap Maybank atas kegagalan memanggil penjual sebagai saksi.

A **Case(s) referred to:**
China New Era International Ltd v. Bank of China (HK) Ltd [2010] 5 HKC 82 ***(refd)***
Gian Singh & Co Ltd v. Banque de L'Indochine [1974-1976] SLR(R) 83 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 182
B Courts of Judicature Act 1964, s. 78

For the appellant - Lambert Rasa-Ratnam, Mong Chung Seng & Ding Ee Lyn; M/s Lee Hishamuddin Allen & Gledhill
For the respondent - T Gunaseelan & Keshvinjeet Singh; M/s Gunaseelan & Assocs

[Editor's note: For the Court of Appeal judgment, please see Punjab National Bank
C *v. Malayan Banking Bhd [2020] 7 CLJ 177 (overruled); For the High Court judgment, please see [2019] 1 CLJ 788 (affirmed).]*

Reported by S Barathi

JUDGMENT

D

Harmindar Singh Dhaliwal FCJ:

[1] This appeal concerns an issue of some importance to the banking industry. The primary question for our consideration is this: under what circumstances can a bank issuing a letter of credit avoid their obligation to
E reimburse the negotiating bank. A further inquiry which must follow is the nature and extent of the duty of the negotiating bank in examining the documents produced under a letter of credit. In a nutshell, therefore, this appeal turns on issues concerning letter of credit transactions and the rights and obligations of the parties involved.

F **[2]** In the present case, the appellant ("Maybank") commenced an action against the respondent ("Punjab Bank") for reimbursement of the sum paid under a letter of credit issued by Punjab Bank. After a full trial, the High Court on 13 August 2018 entered judgment against Punjab Bank for the sum of USD 1,983,765.65 together with interest at 5% per annum until date of
G full payment. On 18 June 2020, the Court of Appeal allowed Punjab Bank's appeal and set aside the High Court judgment.

[3] Maybank was, however, successful in obtaining leave of this court to file an appeal on the following questions of law:

H Question 1:

Where an issuing bank of a letter of credit governed by UCP-600 determines documents presented do not constitute a complying presentation, whether the issuing bank:

(a) Must give notice to the negotiating bank in accordance with
I art. 16(c) & (d) UCP-600, irrespective of the nature of the non-compliance;

(b) Is precluded from claiming the documents presented do not constitute a complying presentation, and obliged to honour their reimbursement undertaking, if notice is not given in accordance with art. 16(c) & (d) UCP-600?

(Question 1 - Notice of Refusal)

Question 2:

In determining whether documents presented under a letter of credit governed by UCP-600 constitute a complying presentation, whether a negotiating bank is only required to examine whether or not the documents appear on their face to constitute a complying presentation within the meaning of UCP-600?

(Question 2 - Standard for examination of documents presented under letter of credit)

Question 3:

Where a letter of credit governed by UCP-600 expressly provides it is available for negotiation by any bank in Malaysia, whether an issuing bank can avoid their obligation to reimburse the negotiating bank on grounds not stated in the notice of refusal, and which relate to the manner of negotiation of the documents presented under the letter of credit?

(... Question - Grounds for refusal to reimburse on a letter of credit)

[4] The appeal was heard on 22 September 2021. After considering the submissions put forward by the parties, we came to the unanimous view that the appeal should be allowed. The order of the Court of Appeal was accordingly set aside and the order of the High Court restored with costs. We had indicated to the parties that a full judgment will be prepared in due course. These are now our reasons for our decision.

The Salient Facts

[5] The salient facts leading to the commencement of the action in the High Court are well stated in the judgments of the courts below and by the parties in their submissions. For the purposes of the present appeal, it will suffice for the relevant facts to be restated as follows.

[6] On or around 18 November 2011, Punjab Bank, at the request of Sara International Limited ("buyer"), issued the letter of credit ("LC") in favour of SIMS Copper Sdn Bhd ("seller") to finance the purchase of goods by the buyer from the seller. The LC was conveyed by Punjab Bank through a SWIFT message (a messaging service provided by the Society for Worldwide Interbank Financial Telecommunication) dated 18 November 2011 to the Royal Bank of Scotland ("RBS"), which was forwarded by RBS to Maybank on 22 November 2011. The terms of the LC were duly communicated by Maybank to the seller.

[7] The terms of the LC *inter alia* expressly provided:

(i) it is irrevocable and governed by the provisions of Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication No. 600 ("UCP-600");

(ii) it has a value of USD 1,962,500, with a tolerance of plus/minus 2% in value;

(iii) it can be negotiated by any bank in Malaysia;

(iv) it allows partial shipments of goods;

(v) Punjab Bank irrevocably undertakes to pay and reimburse the negotiating bank on the maturity of the LC, that is, 60 days from the date of the bill of lading ("reimbursement undertaking"); and

(vi) the seller is required to present the documents specified in the LC to obtain payment.

[8] It may be convenient to observe at the outset that the UCP is a set of comprehensive contractual rules governing letter of credit transactions. They are published by the International Chambers of Commerce ("ICC") to promote uniformity in letter of credit practice worldwide. They are settled by experts from the private sectors and are revised from time to time to address development in the banking, transport and insurance industries. Since its inception, the UCP has been universally accepted across the world by those involved in international trade. In the instant case, the LC expressly incorporates UCP-600 which came into effect on 1 July 2007. It was common ground that the rules in UCP-600, unless expressly excluded or modified, are binding on all parties to the LC. We will need to come back to the salient terms of the UCP-600 later on.

[9] To continue the narrative, on 24 November 2011, the seller presented the documents specified in the LC to Maybank in ten separate presentations and requested Maybank to negotiate (*ie*, purchase) them. On 25 November 2011, Maybank relying on the reimbursement undertaking negotiated the documents and paid a total sum of USD 1,983,765.65 to the seller under the LC. Maybank claimed that payment was made after satisfying itself the documents presented, on their face, to constitute a complying presentation.

[10] On 1 December 2011, Maybank forwarded the original documents presented by the seller under the LC ("documents") to Punjab Bank by courier and sought reimbursement of the sums paid to the seller. In their cover letters enclosing the documents, Maybank expressly instructed Punjab Bank to send all communication regarding the documents to them and to remit payment to Wells Fargo Bank, New York ("Wells Fargo"). The material parts of the cover letters read:

Our Reference: 99110WAM2155558
Pudu Trade Finance Centre
2nd Floor, 418-424 Jalan Pudu
55100 Kuala Lumpur, Malaysia

Swift : MBBEMYKLXXX

Telex : TELEX ANSBK:

Cable :

Documentary Credit Schedule
Mail To:
Punjab National Bank
CC-21 Nehru Enclave
Kalkaji New Delhi 110019-India
your reference: 1529flc-11204/11 dated: 18/11/11

We enclose the following documents for negotiation/payment: mailing 1 mailing 2 document name

Kindly effect your payment in accordance with the instructions given below:

We certify endorsement of drawing amount is on the reverse of the credit

We certify documents received within presentation period and validity of credit

We certify all terms and conditions of letter of credit are complied with

Advise acceptance and maturity date by swift/telex.

Upon payment, kindly remit proceeds by < airmail/swift/telex > to Wells Fargo Bank, New York 11 Penn Plaza 4th Floor New York, NY 10001 USA for credit of Maybank, Kuala Lumpur quoting above reference number and advise us by authenticated swift/telex of the amount remitted.

Please also instruct wells Fargo Bank, New York 11 Penn Plaza 4th Floor New York, NY 10001 USA to advise us by authenticated telex/swift MT202/MT400 of the amount credited quoting our reference number accordingly. Our telex number is/swift code is MBBEMYKLAXXX.

Please acknowledge receipt of this documentary credit schedule by airmail.

This drawing is subject to Uniform Customs and Practice for Documentary Credits (2007 revision), ICC Publication No 600.

All communications regarding this documentary credit schedule should be sent to our above address quoting our reference number.

[11] The documents were duly delivered to Punjab Bank on 3 December 2011. Pursuant to art. 14(b) UCP-600, Punjab Bank had until 10 December 2011 to examine the documents to determine if they constituted a complying presentation. In the event that Punjab Bank considered there was no complying presentation, it could refuse to honour its reimbursement undertaking by giving a notice of refusal.

[12] On 20 December 2011, Maybank received a SWIFT message dated the same from Punjab Bank alleging, amongst others, the bills of lading presented under the LC were discrepant ("notice of refusal"). Notably, this Notice of Refusal was the first notification from Punjab Bank to Maybank. Prior to 20 December 2011, no notice of the purported discrepancies was ever sent to Maybank by Punjab Bank.

[13] By SWIFT messages dated 27 December 2011 and 28 December 2011, Maybank disputed the validity of the notice of refusal and the discrepancies raised by Punjab Bank. In addition thereto, Maybank also demanded payment and reimbursement of the sum paid to the seller on 21 January 2012 which was the maturity date of the LC.

[14] By SWIFT message dated 30 December 2011, Punjab Bank claimed they have notified Wells Fargo of the alleged discrepancies *via* a SWIFT message dated 8 December 2011 ("notice to Wells Fargo"). As revealed by the evidence, this notice to Wells Fargo was only received by Maybank on 27 September 2013.

[15] By SWIFT message dated 3 January 2012, Maybank requested Punjab Bank to seek waiver of the alleged discrepancies from the buyer and thereafter effect payment to them. Seeking for such a waiver is a common practice for banks whenever discrepancy issues are raised about the documents presented in letters of credit transactions.

[16] On 4 January 2012, Punjab Bank informed Maybank that the buyer was not willing to waive the alleged discrepancies in the documents and that they would return the documents. Maybank received the documents on 6 January 2012. Maybank continued to follow up with Punjab Bank on the reimbursement under the LC. As payment and reimbursement was not forthcoming, Maybank commenced the instant action.

Proceedings In The Courts Below

[17] In the High Court, Maybank sought for reimbursement of the sum of USD 1,983,765.65 under the letter of credit, together with interest. Punjab Bank's defence at trial can be summarised as follows:

(i) Punjab Bank is not obliged to reimburse Maybank as the bills of lading were not compliant.

(ii) The sum of USD 1,983,765.65 paid by Maybank to the seller was pursuant to a loan and not negotiation of the LC.

(iii) The notice to Wells Fargo is a valid notice of refusal. Wells Fargo was Maybank's agent and had the authority to accept the notice of refusal on behalf of Maybank. Pursuant to s. 182 Contracts Act 1950, Wells Fargo's knowledge of the purported discrepancies in the documents ought to be imputed to Maybank.

(iv) Maybank is estopped from challenging the validity of the notice to Wells Fargo as they requested Punjab Bank to seek waiver of the purported discrepancies from the buyer and paid the charges for return of the original documents.

(v) Maybank acted at their own risk by accepting faxed copies of the documents and making payment to the seller on 25 November 2011, without examining the original documents. Maybank also failed to prove they have received a faxed copy of all the documents before making payment to the seller.

[18] The High Court was not persuaded by the arguments raised by Punjab Bank and entered the judgment in favour of Maybank. In summary, the High Court held:

(i) Pursuant to art. 7(b) and (c) UCP-600, Punjab Bank is obliged to honour their reimbursement undertaking as Maybank had negotiated the letter of credit and forwarded the original documents to Punjab Bank.

(ii) The bills of lading on their face complied with the terms of the LC and arts. 14(I) and 20 of UCP-600. Punjab Bank's obligation to honour the reimbursement undertaking is not absolved even if the bills of lading were not compliant. To avoid liability to reimburse Maybank on the ground of discrepancy, art. 16(f) of UCP-600 obliges Punjab Bank to give a notice of refusal to Maybank in accordance with art. 16(c) and (d) UCP-600. However, Punjab Bank failed to give a valid notice of refusal to Maybank. They are therefore precluded from claiming the documents are discrepant.

(iii) The notice to Wells Fargo is not a valid notice of refusal as it did not comply with art. 16(c) of UCP-600. It was not sent to the presenter (*ie*, Maybank) and did not state that Punjab Bank is refusing to honour. Further, the evidence shows that Wells Fargo was appointed by Maybank for the limited purpose of tracing and receiving funds under the LC. In the circumstances, the notice to Wells Fargo cannot be treated as a valid notice to Maybank.

(iv) Estoppel did not apply against Maybank as there was no representation by Maybank that they acknowledged the purported discrepancies and validity of the notice of refusal.

[19] Against this decision, Punjab Bank appealed to the Court of Appeal. The appeal was allowed and the decision of the High Court was set aside. In summary, the Court of Appeal held:

(i) It is well accepted that banks must apply the principle of strict compliance with the terms of the letter of credit. In this case, it was a condition precedent of the letter of credit that an ocean bill of lading must be presented. The letter of credit expressly provides a freight forwarder bill of lading is not acceptable.

(ii) A freight forwarder bill of lading is a weak form of document as compared to an ocean bill of lading. An ocean bill of lading is issued by the owner or charterer of the ship which evidences that goods have been loaded on the ship. It gives full details of the carrier and the type, quantity and destination of the goods. However, a freight forwarder bill of lading is more of a domestic bill and there is no assurance that goods have actually been loaded on the ship. Therefore, it is not a surprise that Punjab Bank on the instruction of the buyer had excluded it from the letter of credit.

(iii) Article 1 UCP-600 allows freight forwarder bills of lading to be expressly excluded even where the letter of credit is governed by UCP-600. Article 20 ought to be read with art. 1. The bills of lading presented by the seller were freight forwarder bills of lading. Releasing payment based on freight forwarder bills of lading amounted to a fundamental breach of the terms of letter of credit and the issue of discrepancy does not arise at all.

(iv) Article 16 UCP-600 relates to discrepant documents. However, non-production of an ocean bill of lading amounted to a fundamental breach of the terms of the letter of credit. Thus, it is not an issue of discrepancy and the requirement of a notice of refusal is not applicable. Even if there is such requirement, a proper notice of refusal has been given on the special facts of this case.

(v) Non-compliance with the requirements of a notice of refusal is also technical in nature as the negotiation took place on 25 November 2011 based on faxed copies of the documents presented by the seller. The documents sent by fax and handed over subsequently cannot be good for negotiation at all.

(vi) It is not in dispute that the money was disbursed to the seller before the maturity date of the letter of credit. In light of this and many sham methodologies not consistent with the terms of the letter of credit, it would be prudent for Maybank to have called the seller as a witness. However, Maybank failed to do so and it adds credibility to Punjab Bank's case that the early payment had to do with a separate loan transaction between Maybank and the seller.

Our Analysis And Decision

[20] As observed at the outset, Maybank successfully obtained leave to appeal to this court on three questions. Much of the same arguments were canvassed before us. In essence, Maybank claimed that the Court of Appeal had significantly departed from widely accepted international rules governing letters of credit, particularly the UCP-600. Hence it was necessary for this court to consider and determine important questions which have now arisen, concerning letter of credit transactions and the rights and obligations of the parties involved.

[21] In this respect, we considered that it would be convenient to decide on the issues which arise from the leave questions in the order as set out at the outset. However, as there is considerable overlapping in the arguments advanced for questions 1 and 2, they ought to be considered and determined together.

Question 1 – Notice Of Refusal; Question 2 – Standard For Examination Of Documents Presented Under Letter Of Credit

[22] In this context, in view of the pronouncements by the Court of Appeal, it is necessary to come back to certain relevant yet fundamental rules in UCP-600. Both parties had accepted they were bound by the rules in UCP-600 under the LC. Firstly, a letter of credit is a separate transaction from the underlying contract between the buyer and the seller. It follows that the duty of a bank to negotiate under the letter of credit is not subject to claims or defences taken under the underlying contract (art. 4, UCP-600). Secondly, banks deal with documents and not with goods, services or performance to which the documents may relate (art. 5, UCP-600). Thirdly, an issuing bank (in this case Punjab Bank) is irrevocably bound to honour as of the time it issues the letter of credit (art. 7(b), UCP-600).

[23] Fourthly, an issuing bank undertakes to reimburse a nominated bank (in this case Maybank) that has honoured or negotiated a complying presentation under the letter of credit and forwarded the documents to the issuing bank. Reimbursement for the amount of a complying presentation under a credit is due at maturity, whether or not the nominated bank prepaid or purchased before maturity. An issuing bank's undertaking to reimburse the nominated bank is independent of the issuing bank's undertaking to the beneficiary (art. 7(c), UCP-600).

[24] On the next question of the duty and obligation of the issuing and nominated bank when faced with letter of credit transactions, the following rules apply. A nominated bank and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether the documents appear on their face to constitute a complying presentation (art. 14(a), UCP-600).

[25] A nominated bank and the issuing bank each have a maximum of five banking days following the day of presentation to determine if a presentation is complying (art. 14(b), UCP-600). If a nominated bank or the issuing bank decides to refuse to honour or negotiate, it must give a single notice to that effect to the presenter. The notice must specify the matters set out in art. 16(c)(i), (ii) and (iii), and be given to the presenter no later than the close of the fifth banking day following the day of presentation (art. 16(c) and (d), UCP-600). If an issuing bank fails to act in accordance with the provisions in art. 16, it shall be precluded from claiming that the documents do not constitute a complying presentation (art. 16(f), UCP-600).

[26] Coming now to questions 1 and 2, the Court of Appeal took the position, rather unfortunately in our view, that the requirement of a notice of refusal was not applicable as the non-production of an ocean bill of lading was not a discrepancy but a fundamental breach. The Court of Appeal appeared to have accepted Punjab Bank's suggestion that a notice of refusal is not required where the documents presented are in breach of a fundamental term of the letter of credit. With respect, this view is plainly untenable as it goes against the express provisions in art. 16 of UCP-600 and is not supported by any authority. It is well-settled that art. 16 of UCP-600 imposes a strict obligation on an issuing bank to give notice of refusal to the negotiating bank, if they refuse to honour their reimbursement undertaking on the ground the documents do not constitute a complying presentation (see *China New Era International Ltd v. Bank of China (HK) Ltd* [2010] 5 HKC 82). We also note that the strict requirements for a notice of refusal is a common feature of international letter of credit transactions.

[27] In the present case, Punjab Bank was fully aware of the requirements of the notice of refusal. Punjab Bank claimed consistently that the bills of lading presented to Maybank did not comply with the terms of the LC. Their refusal to honour their reimbursement undertaking was premised solely on the claim that the documents contained discrepancies. This was reflected in the notice of refusal which listed the discrepancy as "Freight Forwarder Bill Of Lading Not Acceptable As Per LC Clause 47B-G". It was therefore not surprising that in the proceedings in the courts below, it was common ground between the parties that whether the bills of lading were compliant or otherwise went to the issue of discrepancy.

[28] In any event, the ground relied upon by Punjab Bank in that the bills of lading presented by the seller did not comply with the LC as they were issued and signed by a freight forwarder, Diffreight Agencies (M) Sdn Bhd, was wholly untenable. Contrary to Punjab Bank's claim, a cursory look at the bills of lading do not show they were issued and signed by a freight forwarder. On their face, the bills of lading were signed by Diffreight Agencies (M) Sdn Bhd, as agent on behalf of the carrier diffreight. There is nothing on the face of the bills of lading which indicated that Diffreight Agencies (M) Sdn Bhd is a freight forwarder.

[29] In this context, Maybank's witness (PW1) unequivocally denied that the bills of lading presented appeared to be freight forwarder bills of lading. Although Punjab Bank's witness (DW1) claimed otherwise, no evidence was led to prove that Diffreight Agencies (M) Sdn Bhd was a freight forwarder. We were therefore persuaded that this claim of the bills of lading being issued and signed by a freight forwarder remained as a bare assertion and in the circumstances the claim was wholly misconceived.

[30] At any rate, even if it was established that Diffreight Agencies (M) Sdn Bhd was a freight forwarder, the fact that they signed "as agent of behalf of the carrier diffreight" meant that the bill of lading was indeed an ocean bill of lading. It could not therefore be a freight forwarder's bill of lading as accepted by the Court of Appeal.

[31] This hearkens back to the issue of the standard of examination of documents presented under a letter of credit. The bank examining a presentation is only required to examine whether the documents appear on the face to constitute a complying presentation (art. 14(a), UCP-600). Banks are not required to go beyond the face of the document. To impose a duty to investigate beyond the documents, as suggested by the Court of Appeal here, is both unrealistic and burdensome to banks. In the commercial world, prompt payments are often crucial and it would not be commercially justified for banks to hire investigators to go behind shipping transactions or other arrangements as they might do in the insurance industry. The efficacy of letters of credit, which are the lifeblood of international trade, may then be severely undermined. It is therefore sufficient for banks "to examine documents with reasonable care to ascertain that they appear on the face to be in accordance with the terms and conditions of the credit" (*Gian Singh & Co Ltd v. Banque de L'Indochine* [1974-1976] SLR(R) 83).

[32] Now, with respect, the Court of Appeal appears to have conflated the separate issues of strict compliance with the terms of a letter of credit with the standard for examination of documents under UCP-600. Accordingly, it was erroneous for the Court of Appeal to have insisted that Maybank should be concerned whether the goods under the LC had been shipped or delivered to the buyer. This finding was contrary to the well-established rule that in letter of credit transactions, banks deal with documents and not with goods.

[33] In the circumstances, and as found by the High Court, Maybank was justified in saying the bills of lading presented by the seller in this case appear on their face to constitute a complying presentation. Accordingly, we would answer both questions 1 and 2 in the affirmative.

Third Question – Grounds For Refusal To Reimburse On A Letter Of Credit

[34] The third question arises from the decision of the Court of Appeal concerning the manner of negotiation of the documents by Maybank. In this context, the Court of Appeal held:

(i) Maybank acted on a frolic of their own by negotiating the letter of credit on 25 November 2011 based on faxed copies of the documents presented by the seller;

(ii) the money was disbursed by Maybank to the seller before the maturity date of the letter of credit, pursuant to a loan granted to the seller; and

(iii) Maybank should have called the seller to give evidence as there were many sham methodologies not consistent with the terms of the letter of credit. As Maybank has failed to call the seller as a witness, it adds credibility to Punjab Bank's case that the early payment was to do with a separate loan transaction and s. 114(g) of the Evidence Act ought to be invoked against Maybank.

[35] The legal position in this regard is well-settled. First and foremost, pursuant to art. 16 of UCP-600, an issuing bank must give a single notice of refusal to the negotiating bank if they wish to refuse to honour on the ground of non-compliance with the terms of the letter of credit. If the issuing bank fails to raise a particular ground in its notice of refusal, it is precluded from raising it after the expiry of the period stipulated for giving a notice of refusal.

[36] In this case, Punjab Bank's sole reason for rejecting the documents at the material time was due to alleged discrepancies in the documents. Punjab Bank did not raise any issue on the manner of negotiation of the documents in their notice of refusal to Maybank. In the circumstances, on settled principles, Punjab Bank is not entitled to raise these issues to avoid their obligation to reimburse Maybank.

[37] In any case, these issues are plainly without merit as Maybank, being the negotiating bank, is fully entitled to determine the manner of negotiation of the documents. They were entitled to pay the seller in advance, in anticipation of receipt of a complete set of the original documents. The Hong Kong Court of Appeal in *China New Era International Ltd v. Bank of China (HK) Ltd* (*supra*) had occasion to deal with this very issue and we find no difficulty in agreeing with the views expressed by Stone J in the following terms:

> [51] The short point, it seems to me, is that as a matter of interpretation there is within art 7c no stipulation to the effect that payment cannot be made to the beneficiary by the negotiating bank until there is a fully compliant presentation, and not before.
>
> [52] The precise manner of negotiation of the documents must be a matter for the negotiating bank; hence if it wishes to make payment under the credit in anticipation (as in the instant case) of submission of a compliant document *in lieu* of one that is not compliant (*vide* the two initially discrepant cargo receipts) it does so at its own commercial risk, such risk often being covered by a beneficiary's indemnity that if ultimately a 'complying presentation' cannot be achieved, then such payment as made will be returned to the paying bank.
>
> [53] However, such discrete commercial arrangement – to which of course the issuing bank is not privy – does not affect the cardinal principal that, under art 7c., the issuing bank undertakes to reimburse the nominated bank that has honoured or negotiated a 'complying presentation', and thereafter has forwarded the documents constituting such compliant presentation to the issuing bank.

> [54] Thus, if the documents as forwarded are found not to be compliant, there will be no obligation so to reimburse; conversely, if such documents are accepted as compliant, the unequivocal obligation arises upon the issuing bank to make reimbursement to the negotiating bank of the payment as earlier made to the beneficiary (or assignee thereof) by that bank.
>
> [55] In my judgment there is, and can be, no remit for the argument – which is precisely that advanced in the present appeal by BOC – that *qua* issuing bank its reimbursement obligation is therefore effectively dependent upon not one but two distinct factors: first, the fact of a 'complying presentation', with the documents comprising such presentation being forwarded by the bank which has taken up the documents and has effected payment under the credit, plus a second factor, namely that the issuing bank is entitled to decline reimbursement, notwithstanding full documentary compliance with the terms of the credit, because at the time of payment by the nominated bank, such a 'complying presentation' had not been effected.
>
> [56] If this interpretation of art 7c were correct, which clearly it is not, the surprising (and wholly unintended) result would ensure that prior to effecting reimbursement, in addition to ensuring that the documents as forwarded to it indeed constituted a 'complying presentation', the obligation of the issuing bank so to reimburse will not crystallise until it also be established that such payment as was effected by the nominated bank did not antedate an ultimately compliant presentation.
>
> [57] In my view, the argument that the issuing bank therefore is entitled to 'vet' or oversee the manner of negotiation by the bank which has made payment under the credit, and thereafter to justify its refusal to reimburse in face of a compliant presentation, possesses neither merit nor commercial justification, and I suspect that this is the very reason that leading counsel on either side apparently have been unable to locate any authority on the point.

[38] It is also pertinent to note that at the trial, DW1 admitted Punjab Bank received the complete set of original documents from Maybank on 3 December. Pursuant to art. 7(b) of UCP-600, Punjab Bank's obligation to reimburse Maybank arose upon receipt of the original documents. In short, the manner of negotiation of the documents was, in our view, wholly irrelevant to Punjab Bank's obligation to reimburse Maybank.

[39] Further, the essence of 'negotiation' in a letter of credit transaction is the purchase of documents by the negotiating bank by advancing funds to the beneficiary and thereafter, presenting the documents in their own rights to the issuing bank for reimbursement. This is expressly provided for in art. 2 of UCP-600:

> **Negotiation** means the purchase by the nominated bank of drafts (drawn on a bank other than the nominated bank) and/or documents under a complying presentation, by advancing or agreeing to advance funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank. (emphasis added)

[40] Thus, payment by Maybank to the seller before the maturity date of the letter of credit was entirely consistent with negotiation of the documents presented by the seller under the letter of credit. With respect, the Court of Appeal was plainly wrong to hold that the payment had to do with a separate loan transaction between Maybank and the seller. As correctly held by the High Court, the evidence at trial clearly showed Maybank paid the sum of USD1,983,765.65 to the seller pursuant to negotiation of the documents under the letter of credit. There was therefore no need for Maybank to call the seller as a witness. Their cause of action against Punjab Bank was for reimbursement of the sum paid under the letter of credit. In the circumstances, the Court of Appeal was also plainly wrong to invoke an adverse inference against Maybank for failing to call the seller as a witness.

[41] In summary, the issues raised by Punjab Bank concerning the manner of negotiation of the documents clearly did not constitute a defence to Maybank's claim. The Court of Appeal was therefore plainly wrong to have reversed the High Court's finding in this regard and to hold that Maybank's conduct is a sham. In the circumstances, question 3 should be answered in the negative.

Conclusion

[42] In conclusion, and for the reasons mentioned, we found merit in the issues raised by the appellant. The appeal was therefore allowed with costs. The order of the Court of Appeal was accordingly set aside and the order of the High Court restored. Since the delivery of the decision, our learned sister Zaleha Yusof FCJ has since retired. This ground of judgment is therefore prepared in accordance with s. 78 of the Courts of Judicature Act 1964.